IN THE SUPREME COURT OF NEW JERSEY
Docket No.: 089973

RUSSELL FORDE HORNOR
Plaintiff-Appellant

v.

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT; ALLENTOWN HIGH SCHOOL; NEW JERSEY FUTURE FARMERS OF AMERICA; CHARLES J. HUTLER, JR., DEFENDANT DOE 1-10; AND DEFENDANT INSTITUTION 1-10
Defendant-Respondents

Brief in Support of Plaintiff-Appellant, Russell Forde Hornor's Motion for Leave to Appeal from the October 8, 2024 Appellate Division Decision

Docket No.: A-366-22, Civil Action

SAT BELOW: HON. ALLISON E. ACCURSO, J.A.D., HON. FRANCIS J. VERNOIA, J.A.D., AND HON. ARNOLD NATALI, J.A.D.

BRIEF FOR PLAINTIFF-APPELLANT RUSSELL FORDE HORNOR

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STATEMENT OF THE CASE

This is a tort action arising out of the injuries and damages suffered by Plaintiff-Petitioner as a result of the sexual abuse inflicted upon him when he was a minor student by Charles Hutler, who utilized his apparent authority and aided agency as a teacher for Defendant Upper Freehold Regional Board of Education to commit the sexual abuse.

STATEMENT OF FACTS

This case involves the child sexual abuse of Plaintiff-Petitioner, Russell Forde Hornor, when he was 15 years old, by Charles Hutler, his teacher and Future Farmers of America coach while he was a student at Allentown High School, operated by Defendant-Respondent, Upper Freehold Regional Board of Education. A46.[1]

Hutler was Plaintiff-Petitioner's freshman Science teacher at Allentown High School. He was also his chapter and advisor and team coach with Defendant Future Farmers of America ("FFA").[2] The FFA meetings were organized through the school and held on the premises. A46.

In the fall of 1978, Hornor obtained employment at a nursery called Hidden Landscape Nursery located in Cream Ridge, New Jersey. However, it was difficult

[1] "A" refers to Plaintiff's New Jersey Supreme Court Appendix. "Pa" refers to Plaintiff's Appendix from the Appellate Division submission.
[2] Defendant FFA is a charitable entity and, therefore, the claims against it are not implicated or impacted by this appeal.

for him to get there every day, therefore he consulted with Hutler, his trusted advisor, who agreed to help him with daily transportation to and from the nursery. A46. Hutler further gained Hornor's trust and friendship by taking him to Future Farmers of America basketball games and events as an FFA chapter advisor and team coach. Additionally, Hutler would also take him to the movies and bowling alley with two of his friends, Robert Zednick and Jim Ugi. After these outings, Hutler would provide Hornor with alcohol and drink with him. A46.

Hornor also came from a troubled and dysfunctional home life. His parents often consumed alcohol excessively, and so they did not notice when Hutler brought him home drunk. He came to perceive Hutler as a mentor. In April of 1979, Hutler encouraged him to participate in a FFA plant and landscaping contest at Rutgers University and Hornor won fourth place in the competition. A46.

After the competition, Hutler took Hornor, Robert, and Jim out to a movie. He drove them to a liquor store and purchased wine for the minor boys. All three minors drank the wine in the car on the way to the movie theater. After the movie, Hutler took Jim and Robert to their respective homes. He then drove to his apartment and informed Russell that he needed to make a phone call. A47. When they arrived at the Hutler's apartment building, Hutler turned to Russell and instructed him to be quiet. Both Hutler and Russell walked up three flights to the apartment, and once both were in the apartment, Hutler instructed Russell to sit down because he

appeared drunk. Hutler then turned on the television and sat down next to Russell on the sofa. Hutler then placed his arm around Russell and started running his fingers through and playing with Russell's hair. Hutler then turned to Russell and said: "*You are so cute*." A47. Russell's heart began to race; Hutler's behavior made him nervous and fearful. A47.

Hutler then placed his hand on Russell's waist and pulled Russell's pants down. Hutler next stood up from the couch and removed his pants and underwear, exposing his bare genitals. A47. Hutler placed his arm around Russell and forcefully hugged the minor. Russell was frozen with fright and did not know what to do. Russell observed Hutler's penis become erect. A47. Hutler then placed his hand on Russell's penis and began manipulating the minor's penis. He then forcefully grabbed the minor's hand and put it on his own penis, and he forced the minor to manipulate Hutler's penis. A47.

At the same time, Hutler attempted to kiss Russell, but the minor kept resisting by moving his face. Hutler than placed his hands on Russell's head and pushed it towards Hutler's penis. Prior to inserting his penis into Russell's mouth, Hutler ejaculated on the minor's face. A47. Hutler then instructed Russell not to say anything because no one would believe Russell. A47. Hornor was so overwhelmed by Hutler that he complied and did not tell anyone. It is specifically alleged that Hutler engaged in a calculated series of manipulation and grooming of Hornor. A48.

All of the foregoing caused Hornor to suffer severe, permanent, and ongoing injuries and damages.

PROCEDURAL HISTORY

As a result of the landmark changes in the law under SB477, Plaintiff-Petitioner's Complaint was filed on November 19, 2021. A37. On April 29, 2022, Defendant-Respondent Upper Freehold Board of Education ("BOE") filed a Motion for Partial Dismissal of Plaintiff's Complaint. Plaintiff-Petitioner filed opposition to the Motion on May 5, 2022. After a conference, the Court requested additional briefing on the breach of fiduciary duty issue, which both parties submitted. On July 18, 2022, oral argument was held.

On July 21, 2022, the Honorable Gregory L. Acquaviva, J.S.C. entered an Order and 34-page Statement of Reasons denying Defendant-Respondent's Motion. A1. On July 26, 2022, Plaintiff-Petitioner filed an Amended Complaint removing punitive damages as a separate count. On August 10, 2022, Defendant-Respondent filed a Motion for Reconsideration of the Court's July 21, 2022 Order and Decision. On August 26, 2022, Judge Acquaviva entered an Order granting Defendant-Respondent Motion for Reconsideration in part, regarding punitive damages, but denying all other requests for reconsideration with respect to vicarious liability and fiduciary duty. A35.

Defendant-Respondent filed a Motion for Leave to Appeal the Trial Court's Orders, which Plaintiff-Petitioner opposed. On October 3, 2022, the Appellate Division granted Defendant-Respondent Motion for Leave to Appeal and Defendant-Respondent filed its Appeal, which Plaintiff-Petitioner opposed. On March 1, 2023, the Appellate Division heard oral argument on the appeal. On October 8, 2024, the Appellate Division issued its decision, reversing Judge Acquaviva's decision and remanding for further proceedings. Plaintiff-Petitioner now respectfully files the instant Motion for Leave to Appeal to this Court.

STANDARD OF REVIEW

Under Rule 2:2-2, "Appeals may be taken to the Supreme Court by its leave from interlocutory orders: (a) Of the Appellate Division when necessary to prevent irreparable injury; or (b) On certification by the Supreme Court to the Appellate Division pursuant to R. 2:12-1." R. 2:2-2.

This Court has considerable discretion to permit an appeal of an interlocutory order. Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 461 (App. Div. 2008). The Court's exercise of discretion "turns on whether leave to appeal will 'prevent the court and the parties from embarking on an improper or unnecessary course of litigation.'" Id. (quoting Brundage v. Estate of Carambio, 195 N.J. 575, 598-600 (2008)). The moving party must establish that the appeal has merit and that justice calls for the Court's decision of the issue. Id. This Court has previously recognized

that the standard for accepting an interlocutory appeal here is similar to the "interests of justice" standard found in R. 2:2-4 that governs the acceptance of these appeals at the Appellate Division. Brundage, 195 N.J. at 599. In assessing whether prompt appeal promotes the "interest of justice," New Jersey courts consider such factors as whether the subject interlocutory order would have dispositive effect on a party or its claims; whether an appeal may materially advance ultimate resolution of the case; whether there is a risk of grave damages or injustice; or whether it implicates novel questions of law or issues of constitutional magnitude. Id. at 599-600 (citations omitted).

QUESTION PRESENTED

Plaintiff presents a novel question for this Court's review that is necessary to prevent irreparable harm:

> Did the Legislature's express intent to achieve the important public policy of protecting all children in New Jersey from sexual abuse by amending the Tort Claims Act so that the standard of liability for a public entity is the same as the standard of liability for a charitable entity subject a public entity to vicarious liability for the acts of child sexual abuse committed by its employee and agents when those acts are committed using the employee/agents apparent authority or aided agency pursuant to this Court's holding in Hardwicke v. Am. Boychoir Sch., 188 N.J. 69 (2006)?
>
> *The Appellate Division answered this question in the negative*.

REASONS WHY LEAVE TO APPEAL SHOULD BE ALLOWED

This Court must reverse the Appellate Division decision in order to prevent irreparable harm and address a novel question of law. For over two years, the parties here (as well as those in the companion cases decided on the same day) have waited patiently for a ruling from the Appellate Division with respect to whether a public entity may be held vicariously liable for acts of child sexual abuse committed by its agent as a result of the amendments to the Tort Claims Act. In addition, scores of other plaintiffs, public entities, and trial courts around the state have also been waiting for this decision. While it was pending, numerous trial courts have been forced to act without guidance on this issue, often reaching contradictory results. Many other matters are now quickly approaching the summary judgment and trial stage, making a definitive ruling on this issue critical. Yet, the Appellate Division has failed to provide victims, public entities or the trial courts with the definitive guidance that is needed here. See R. 1:36-3 ("No unpublished opinion shall constitute precedent or be binding upon any court. . . . no unpublished opinion shall be cited by any court."). This amounts to irreparable harm and will certainly result in additional and unnecessary litigation and appeals until a binding decision on this issue is issued. This Court must now step in and provide that definitive guidance.

The Appellate Division decision also results in irreparable harm because it fundamentally fails to carry out the Legislature's clear and express intent to amend

the Tort Claims Act to achieve New Jersey's important public policy of protecting children from horrific acts of child sexual abuse by allowing victims to hold the institutions in the best position to prevent this harm accountable, regardless of whether those institutions are public, charitable or private.

Despite this crystal-clear intent, the Appellate Division ruling results in irreparable harm by holding public entities to a lower standard of accountability than charitable and private entities. This contradicts the Legislature's express intent by placing a greater burden on charitable and private institutions than public ones. It also unfairly and unnecessarily imposes a higher standard of proof upon victims of child sexual abuse who were sexually abused by an agent of a public entity than the standard imposed upon those abused by an agent of a charitable entity. This could also have a chilling effect on those victims that were abused by employees/agents of public entities, but have not yet come forward. Most importantly, the decision improperly places the vast majority of children in New Jersey, including our most vulnerable children, at greater risk of being sexually abused by predators, simply because they attend a public school or entity rather than a private or charitable school or entity. This disparate treatment is fundamentally unfair, unnecessary, and causes irreparable harm.

The Appellate Division appears to feel compelled to arrive at this fundamentally unfair decision as a result of a narrow interpretation of the Tort

Claims Act, which must be rejected. The decision is based on its belief that the *only* way that liability can be imposed under the Tort Claims Act ("TCA") is by identifying a "predicate liability" and then clearing any other remaining hurdles presented by immunities in the TCA. Unfortunately, the Appellate Division's dogmatic adherence to this requirement leads it to reject the imposition of vicarious liability on a public entity under Hardwicke, a result that flatly contradicts the Legislature's express intent of amending the TCA to make the standard of liability the same for public entities as it is for charitable entities. The Appellate Division's narrow view of the TCA is wrong and creates irreparable harm by setting a flawed standard for interpreting the Act.

In reality, locating a "predicate liability" is one way to impose liability on a public entity under the TCA. But another, simpler way to impose liability is by removing the immunity provided by the TCA in the first place, which is what the Legislature has chosen to do here by inserting N.J.S.A. § 59:2-1.3. This Court should recognize that liability and immunity are really two sides of the same coin; there is no credible logical difference between saying that an entity is liable for a certain act and saying that the immunity from liability for that certain act has been removed. This Court should recognize that both of these mechanisms are viable ways to remove immunity and impose liability under the TCA. Moreover, recognizing that the Legislature can remove immunity (rather than only being

permitted to impose "predicate liability") under the TCA allows this Court to effectuate, rather than contradict, the clear intent of the Legislature to protect children in New Jersey from the dangers of sexual abuse by making the standard for liability the same for both public and charitable entities.

Point One: The Appellate Division Decision Creates Irreparable Harm Because It Contradicts Both the Plain Language and Intent of 59:2-1.3 Which Unambiguously Removes a Public Entity's Immunity for an Employee's Act of Child Sexual Abuse

In 2019, our Legislature passed Senate Bill 477 ("SB477"), a groundbreaking legislation that was passed with bipartisan support with the express purpose of allowing survivors of child sexual abuse like Plaintiff-Petitioner to bring the claims against public entities like Defendant-Respondent.

SB477 modified multiple statutes, including changing the statute of limitations; removing restrictive language from the Child Sexual Abuse Act ("CSAA"); amending the Charitable Immunity Act ("CIA"); and amending the Tort Claims Act ("TCA"). Specifically, SB 477 amended § 59:2-1.3 of the TCA to remove the immunity a school district previously had from lawsuits arising from an employee's sexual abuse of a minor. The plain language demonstrates that the BOE may now be both (1) vicariously liable for the sexual abuse committed by its employees and (2) directly liable for its own negligent hiring, retention, and supervision of employees who commit such abuse.

On May 13, 2019, Governor Murphy signed SB477 into law, which became effective December 1, 2019. In signing the law, Governor Murphy clearly stated that the purpose of SB477 was to provide justice and compensation to victims of sexual abuse, notwithstanding the significant financial impact it would have on entities like Defendant-Respondent. A103.

At the same time, Governor Murphy also explicitly recognized that public entities like schools should and would be subject to the same liability as charitable and private entities. He went on to state that the bill, as signed, contained an error that must be corrected "in the section of the bill relating to the liability of public entities. This section inadvertently fails to establish a standard of proof for cases involving claims filed against public entities." A103 (emphasis added). As a result, and critically important here, Governor Murphy further stated that he had "received assurances that the Legislature will correct this omission by clarifying that **public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified."** A103 (emphasis added). This makes it unquestionably clear that the subsequent amendment to the TCA in 59:2-1.3 was intended to establish a liability standard for claims related to sexual abuse against public entities and this standard was intended to be equivalent to that for charitable entities. This fact alone

demonstrates that the Appellate Division decision is flawed and must be reversed because it contradicts this stated intent.

As a result, the Legislature passed the "clean-up bill" that amended 59:2-1.3 such that a public entity's liability for sexual abuse of minors is now the same as that of private and charitable entities. The plain language of 59:2-1.3(1) removes a public entities immunity for a public employee's acts of sexual abuse that are caused by willful, wanton or grossly negligent acts.[3] Put simply, by removing a public entity's immunity, a plain reading of this section imposes vicarious liability upon a public entity for the public employee's acts of sexual abuse. Our Courts have long recognized that the plain language of a statute should control.

> The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language. Frugis v. Bracigliano, 177 N.J. 250, 280, 827 A.2d 1040 (2003). We ascribe to the statutory words their ordinary meaning and significance, Lane v. Holderman, 23 N.J. 304, 313, 129 A.2d 8 (1957), and read them in context with related provisions so as to give sense to the legislation as a whole, Chasin v. Montclair State Univ., 159 N.J. 418, 426-27, 732 A.2d 457 (1999). It is not the function of this Court to "rewrite a plainly-written enactment of the Legislature []or presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002). We cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment," Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230, 87

[3] The contrast between a public entity's liability for the "willful, wanton and grossly negligent" conduct of its public employee in 59:2-1.3(1) with the public entity's direct liability for "negligent hiring, supervision, and retention" in 59:2-1.3(2) also demonstrates that the Legislature intended for public entities to be both vicariously liable and directly liable.

> A.2d 721 (1952), or "engage in conjecture or surmise which will circumvent the plain meaning of the act," In re Closing of Jamesburg High School, 83 N.J. 540, 548, 416 A.2d 896 (1980). "Our duty is to construe and apply the statute as enacted." Ibid.

DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). Here, 59:2-1.3 is actually unambiguous. If the edicts of DiProspero regarding statutory interpretation are taken literally, then it is clear that a plain reading of this section means that a public entity no longer has any immunity from vicarious liability for acts of sexual abuse of its employees, including vicarious liability pursuant to Hardwicke v. American Boychoir School, 902 A.2d 900 (N.J. 2006).[4] There really is no other way to read this section than as removing a public entity's immunity from vicarious liability for acts of sexual abuse committed by its employees or agents. This Court's analysis could begin, and end, here. See O'Connell v. State, 171 N.J. 484, 488 (2002).

As a consequence, this removal of immunity for vicarious liability necessarily includes the imposition of liability for acts of sexual abuse that are traditionally considered outside the scope of employment, when those acts are committed by the agents using either apparent authority or aided agency pursuant to Restatement (2d.) of Agency §219(2)(d). Hardwicke, 902 A.2d at 903, 915-18.

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[4] To be clear, the vicarious liability established in Hardwicke pursuant to Restatement (2d.) § 219(2)(d) does not amount to strict liability, but rather makes vicarious liability contingent upon facts demonstrating that the employee-perpetrator utilized his apparent authority or was aided by the power of his/her position in committing the sexual abuse.

The defendant in Hardwicke was a private school, organized as a charitable entity. Hardwicke, 902 A.2d at 903, 915-18. There, as here, the school claimed that it could not be vicariously liable for the acts of its agent because the acts of sexual abuse were outside the scope of employment. In deciding this issue, this Court held that the school could be vicariously liable for its employees' sexual abuse of a minor student under modern principles of agency. Id. at 919. The Court held that § 219(2)(d) applies to cases involving child sexual abuse, specifically finding that the application of vicarious liability pursuant to the Restatement forwards the goals of protecting vulnerable children from victimization. Id. at 920 ("the CSAA . . . recognizes the vulnerability of children and demonstrates a legislative intent to protect them from victimization. In our view, common-law claims based on child abuse are supported by the same compelling rationale. The CSAA imposes responsibility on those in the best position to know of the abuse and stop it; application of section 219 of the Restatement to plaintiff's common-law claims advances those goals."). The Court also held that the school's immunity under the CIA did not bar these common-law claims. Id. at 915-18.

Hardwicke and § 219 reflect the paramount importance of New Jersey's public policy to protect vulnerable children from being victimized by sexual predators that, sadly, were and are still present in virtually every institution in our society. This

same public policy is also what led to the adoption of SB477 and the accompanying amendments to the TCA, the CIA, and the statute of limitations.

In order to achieve this important public policy, the Legislature deemed it appropriate and amended the TCA so that the standard of liability of a public entity is the same as the standard for a charitable entity. A natural and appropriate result of this is that Hardwicke now also applies to public entities such as the Defendant-Respondent.

There is no doubt that the plain language and the express intent of SB477 is to make the liability of a public entity equal to that of a charitable entity. Not only did Governor Murphy make this clear, but every piece of extrinsic evidence from either the Senate or Assembly proves this. The Senate Judiciary Committee stated:

> **Section 7 - Child and Adult Victims:** This section provides that the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., or any other law, that may provide some form of governmental immunity from lawsuits based on injuries resulting from acts of sexual abuse are inapplicable, so that any public entity, as defined in the "New Jersey Tort Claims Act," may be held liable in any such suit in the same manner as a private organization.

Sen. Judic. Comm. Stmt. to Subst. for SB477, Mar. 7, 2019, at p.5 (emphasis added). A413. There is no other logical way to read this, other than recognizing, contrary to the Appellate Division's opinion, that a public entity may now be held liable, including vicariously liable, for acts of sexual abuse, in the exact same manner as a

private (or charitable) organization. Hardwicke applies to both private and charitable entities, so it now applies to public entities, as well.

Every other statement regarding this piece of Legislation also requires this same conclusion. Assem. Budget Comm. Stmt. to A5392, June 17, 2019, at 1 A392 ("This bill, as amended, establishes new liability standards in sexual abuse lawsuits filed against public entities and public employees. It would expressly provide that the statutory immunity from lawsuits granted to public entities and public employees pursuant to the "New Jersey Tort Claims Act," . . . would not be applicable . . . ."); see also Leg. Fiscal Est. for A5392, June 24, 2019, at p. 2 (accord) A395; *Leg. Fiscal Est. for SB3739*, June 24, 2019, at 2 (accord) A404. This makes it abundantly clear that 59:2-1.3 removes the immunity under the TCA for acts of sexual abuse such that a public entity's liability is now the same as a charitable entity's liability. Yet, somehow, the Appellate Division decision leaves in place a public entity's immunity for vicarious liability under Hardwicke, while a charitable entity is exposed to this.[5]

This Court must prevent irreparable harm by reversing the Appellate Division's ruling, which, by creating a different standard of liability for a public

[5] Even if the Appellate Division believed that the language of 59:2-1.3 is ambiguous, this would mean that it should have turned for guidance to the Legislative intent, which should have resulted in the opposite conclusion from the one it reached. DiProspero v. Penn, 183 N.J. at 492-93 ("if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'") (citation omitted).

entity than for a charitable one, violates both the plain meaning of 59:2-1.3 as well as the unambiguous intent of the Legislature. The Appellate Division ruling fundamentally fails to achieve the Legislature's overarching goal of protecting all children in New Jersey from the dangers of horrific child sexual abuse by making those children who attend public entities less safe than those who attend charitable or private institutions; depriving victims of child sexual abuse who were sexually abused by an employee of a public entity of the same remedy at law of those victims sexually abused by an employee of a private or charitable entity; and creating a chilling effect for those victims who were abused by employees of a public entity but have not yet come forward. This Court should instead honor both the plain language of 59:2-1.3 and the express intent of the Legislature by reversing the Appellate Division decision and holding that a public entity is subject to the same standard of liability as a charitable entity and may be held vicariously liable under Hardwicke.

Point Two: The Appellate Division Decision Fails to Recognize that Disabling a Public Entity's Immunity Under the Tort Claims Act Imposes Vicarious Liability under Hardwicke

Instead of reaching a straightforward application of the language and intent of 59:2-1.3, the Appellate Division chose to focus on the history of the TCA and a single-minded dedication to finding a "predicate liability" that, in its view, must be located in the TCA in order for vicarious liability to apply to a public entity under

Hardwicke. See, e.g., App. Div. Op. at 23, A342 ("Thus, in analyzing a tort claim against a public entity in New Jersey, the first task is always to locate the predicate for liability in the Act . . . . If there is no predicate for liability, the inquiry is at an end.") (citations omitted); p. 62, A381("Hornor's failure to identify a liability predicate in the Act for the Board's vicarious liability for Hutler's sexual assault is fatal to Hornor's vicarious liability claim against the Board.") (citations omitted).

The Appellate Division takes this position too far. While it is undoubtedly true that locating a predicate for liability is *one way* to determine liability and immunity under the TCA, the Appellate Division's mistake is insisting that this is the *only* way to do so.

There is a simpler way to understand the TCA that actually conforms with, rather than contradicts, the language of 59:2-1.3 and the express intent of the Legislature. This starts by recognizing that, first and foremost, the TCA begins with a broad grant of sovereign immunity. The Tort Claims Act was enacted in 1972 in response to this Court's decision abrogating the common-law doctrine of sovereign immunity in tort cases against public entities. App. Div. Op. at 21; Frugis v. Bracigliano, 177 N.J. 250, 275 (2003). The TCA's Legislative declaration restores the broad immunity that public entities had prior to the enactment of the TCA. N.J.S.A 59:1-2. The TCA then carves out certain specific liabilities from that established immunity. See N.J.S.A. § 59:2-1 Task Force Comment. As this Court

recognized long ago, "[I]mmunity for public entities is the rule and liability is the exception." Frugis, 177 N.J. 250 at 275 (citation omitted). To put it another way, the TCA provides sovereign immunity for all acts. It then establishes affirmative liability for certain acts.

However, it must be recognized that, in carving out certain liabilities, it leaves in place immunity for other acts. What the Appellate Division fails to realize is that these remaining or residual immunities can also be limited or removed, as here, by an amendment to the TCA. In reality, the Appellate Division's "predicate liabilities" are more properly understood as a limitation or removal of an immunity. It makes no logical difference whether a public entity's immunity is curtailed by an overt imposition of liability (the Appellate Division's "predicate liability") **or**, as is done in 59:2-1.3, a limitation of an immunity. In reality, the imposition of liability and the limitation of immunity are two sides of the same coin. Logically speaking, declaring in 59:2-1.3 that immunity from a certain type of liability for certain acts no longer applies is the same thing as declaring a "predicate liability" for those acts. The Appellate Division's mistake is focusing so dogmatically on one to the total exclusion of the other.

Here, 59:1-2 of the TCA, by reinstating a broad blanket of sovereign immunity, provided public entities with immunity from vicarious liability for all acts of its employees, both inside and outside the scope of employment. In 59:2-2, the

TCA then limited that immunity by permitting vicarious liability for the acts of employees that occur within the scope of employment. What the Appellate Division fails to recognize, and what is critical here, is that in carving out vicarious liability for an employee's acts inside the scope of employment, the TCA left in place a public entity's immunity from vicarious liability for acts of employees outside the scope of employment. The amendments to the TCA in 59:2-1.3 simply remove this remaining or residual immunity with respect to acts outside the scope of employment involving child sexual abuse. In doing so, the Legislature amended the TCA so that it now "declares" a public entity "to be liable" for acts outside the scope of employment under Hardwicke. This is perfectly consistent with the history of the TCA and the case law cited by the Appellate Division. More importantly, recognizing this much simpler reality, and rejecting that identifying a "predicate liability" is the *only* way to determine liability under the TCA, allows this Court to avoid irreparable harm by protecting all children in New Jersey. This achieves the Legislature's express intent by making the standard of liability the same for public entities as for charitable entities, which consequently means that a public entity may now be held vicariously liable for acts of sexual abuse committed by its employees and agents under Hardwicke.

Point Three: The Appellate Division Decision Creates Irreparable Harm Because it is Fatally Contradictory

The Appellate Division recognizes that the 2019 amendments removed the "household" requirement and, therefore, a public entity may now be held liable as a passive abuser under the CSAA. App. Div. Op. at p. 58-9. There is no question that this is correct, in combination with the removal of immunity provided by 59:2-1.3. [6] But this fact completely contradicts the Appellate Division's entire holding, as well as its dogged refusal to concede that public entities may now be held vicariously liable under Hardwicke because, quite simply, there is no "predicate liability" for "passive abuser" written anywhere in the TCA. If the "failure to identify a liability predicate in the Act . . . is fatal to Hornor's vicarious liability claim against the Board" then it would likewise be fatal to a claim for passive abuser liability. See App. Div. Op. at p. 62., A381. The Appellate Division's failure to recognize and explain this contradiction is fatal to the belief that "predicate liability" is a necessary prerequisite to liability under the TCA and, therefore, fatal to its entire decision.[7] It

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[6] There is no doubt that liability as a passive abuser for a public entity is also predicated upon the removal of the household provision of the CSAA. But this alone would not have been enough, without 59:2-1.3's removal of liability for willful acts, since our Courts have made it clear that the liability standard for a passive abuser is willful conduct. Hardwicke, 188 N.J. at 83.

[7] It must also be pointed out that the Appellate Division cannot simply pick and choose which parts of the binding Supreme Court precedent in Hardwicke it wants to apply. There is no logical reason to admit that Hardwicke's holding with respect to passive abuser status now applies, but deny that it's holding with respect to vicarious liability does so. Clearly, both now apply, regardless of the Appellate

is really 59:2-1.3 that permits passive abuser liability, not any "predicate liability" provision found in the TCA.

Point Four: The Appellate Division Decision Creates Irreparable Harm By Improperly Interpreting the Vicarious Liability Imposed Under Hardwicke

To the extent that the Appellate Division, in *dicta*, appears to suggest that vicarious liability under Hardwicke is contingent upon liability as a passive abuser under the CSAA, this must be roundly rejected by this Court.

There is absolutely no support in the Hardwicke decision for this suggestion. In fact, the opposite is true. Hardwicke, 188 N.J. at 94, 102; see also Hardwicke v. Am. Boychoir Sch., 368 N.J. Super. 71, 97, (App. Div. 2004) ("The following analysis addresses only the continued viability, in light of charitable immunity, of those common-law causes of action that plaintiff seeks to assert independently from his claim under the Child Sexual Abuse Act.") (emphasis added). The vicarious liability established in Hardwicke pursuant to Restatement (2d.) § 219(2)(d) is not strict liability, rather it is contingent upon facts demonstrating that the employee-perpetrator utilized his apparent authority or was aided by the power of his/her position in committing the sexual abuse. To suggest that imposing this vicarious

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Division's refusal to recognize this, which merely demonstrates another reason the decision must be reversed.

liability is somehow contingent upon first establishing that the entity is a passive abuser is completely contrary to the entire concept of vicarious liability.

Additionally, in the nearly twenty years since Hardwicke was decided, undersigned counsel has not found any other opinion suggesting that the imposition of vicarious liability pursuant to Restatement 219(2)(d) is somehow linked to demonstrating liability as a passive abuser under the CSAA. Hardwicke made clear that the standard for passive abuser liability is knowing conduct, which is an entirely different standard than vicarious liability. Hardwicke, 188 N.J. at 83. The mere suggestions that vicarious liability under Hardwicke is in some way connected to passive abuser liability lacks any rationale or support and clouds the issues properly before this Court. This creates irreparable harm and should be strongly rejected by this Court.

Point Five: The Appellate Division Decision Creates Irreparable Harm By Narrowly Construing Acts of Sexual Abuse as Outside the Scope of Employment

The Defendant-Respondent and the Appellate Division's positions are entirely predicated on the belief that acts of child sexual abuse are traditionally viewed as outside the scope of employment. However, the Appellate Division fails to recognize that the application of Restatement 219(2)(d) here, under Hardwicke, creates an exception to this that makes such acts *functionally* within the scope of employment. As a result, all of the Appellate Division's concerns disappear because

liability for such acts is provided by 59:2-2 and any immunity potentially provided by 59:2-10 has been removed by 59:2-1.3.

For all intent and purposes, Hardwicke essentially created an exception to the general rule that entities do not have vicarious liability for an employee's acts traditionally considered outside the scope of employment and instead imposed liability by treating these occurrences of child sexual abuse as if they had occurred within the scope of employment. The viability of this continues to this day. [8]

It is entirely possible that the Legislature believed that acts of child sexual abuse where *functionally* within the scope of employment for purposes of 59:2-2, pursuant to Hardwicke, and so all that really needed to be done was remove the

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[8] In fact, the Rstmt. (3d.) of Agency, contrary to the statements of Defendant-Respondent and the Appellate Division, did not eliminate vicarious liability under 219(2)(d). On the contrary, cmt. b of Rstmt. (3d.) § 708 clearly states that the concept of aided agency is incorporated into the duty that a principal owes to third parties under § 7.05. In reality, the Rstmt. (3d.) embraces Hardwicke's concept of vicarious liability and incorporates it into § 7.05(2). Comment e to this section makes it clear that where there is a special relationship, including a school with its students, a "principal may be subjected to liability although the employee or other agent acted without actual or apparent authority . . . . An employer may be subject to liability although in harming the person the employee acted outside the scope of employment . . . . In particular, relationship that expose young children to the risk of sexual abuse are ones in which a high degree of vulnerability may reasonably require measures of protection not necessary for persons who are older and better able to safeguard themselves." Rstmt. (3d.) § 7.05(2), cmt e. Further proof of this is demonstrated by the fact that the final reporter's note to §7.05 on the applicable duty of care specifically cites Hardwicke. Rstmt. (3d.) § 7.05, Reporter's Notes.

entity's immunity for these acts provided by 59:2-10. In this light, 59:2-1.3 accomplished this goal and results in the imposition of vicarious liability upon a public entity under Hardwicke.

Point Six: Appellate Division's Refusal to Recognize a Fiduciary Duty Creates Irreparable Harm

Judge Acquaviva's well-reasoned opinion perfectly states the case for a modest extension of a fiduciary duty to the circumstances here and Plaintiff-Petitioner incorporates that opinion herein. In rejecting his logic, the Appellate Division refers to case law and the model jury instructions, but if anything these demonstrate the elevated duty that New Jersey recognizes that a teacher and by association the entity who employs him or her, owes to a student. This heightened duty of care results from the "special relationship" that is created between the teacher and the student. If the relationship between a priest and penitent deserved the protections afforded the concept of fiduciary duty in F.G. v. MacDonell, 150 N.J. 550 (1997) due to the "special relationship" and power differential, then certainly the most vulnerable members of our society, our children, likewise deserve those same protections when we entrust them to the care of public entities.

CONCLUSION

For all the foregoing reasons, Plaintiff's Motion for Leave to Appeal the Appellate Division's October 8, 2024 decision should be granted.

Respectfully submitted,

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